SUPREME COURT

OF THE

UNITED STATES.

Case No. 343.

EDWIN W. PARCELS, PLAINTIFF IN ERROR,

VS

PRISCILLA JOHNSON AND HER HUSBAND,

HENRY JOHNSON, Defendants in Error.

ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT OF CASE AND BRIEF SUBMITTED BY COUNSEL FOR PLAINTIFF IN ERROR.

Brief Submitted by Matt. H Carpenter, of Wisconsin, and B. G. Barrow, of Missouri.

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1874.

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Error to the Supreme Court of Missouri.

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Statement of Case and Brief submitted by counsel for plaintiff in error.

STATEMENT OF CASE.

On the 5th day of May, A. D. 1870, defendants in error commenced a suit in the Circuit Court of Adair county, in the State of Missouri, for the purpose of procuring the assignment of dower in favor of Priscilla Johnson, wife of one of defendants in error, in the southeast quarter of section four, in township 62, north of range fifteen, west of fifth principal meridian, lying in said county of Adair, aforesaid. This claim for dower was based upon the following facts, viz: That one Uriah W. Skinner, late of Halifax, North Carolina, intermarried with said Priscilla, and afterward died in 1834, seized of an estate of inherit-

ance in said land, to which said Priscilla had not, during the marriage, relinquished her right of dower; that she and Henry Johnson intermarried in 1840, alleging that plaintiff in error was in possession of all of said land, and claims ownership as grantee of Henry C. Skinner, heir of Uriah W. Skinner, except that portion laid off into town-lots, known as the north-east addition to the town of Kirksville, claiming that her dower had not been assigned, etc.

To this claim, plaintiff in error filed an answer, and admitted the death of Uriah W. Skinner, in January 1834; denied that Priscilla was the widow of Uriah W. and admitted the marriage between Priscilla and Henry Johnson, in 1840; denied that Uriah W. Skinner died, seized, or that he ever was seized of an ESTATE OF INHERITANCE or any OTHER ESTATE in and to the land in controversy.

Admitted the possession of plaintiff in error, and specially averred in his answer, that the title to the land (the fee) was in the Government of the United States up to the 11th day of January, 1847.

That on that day, said land was taken up by locating thereon a military land warrant, No. 26,198, issued in the name of Uriah W. Skinner, or rather by the location of a certificate of RE-issue of said warrant, and which location was made under the following circumstances, viz:

Said warrant was granted by the War Department of the United States, on the 27th day of March, 1829, in the name of Uriah W. Skinner, a private in Walker's company, 35th Regiment U S. Infantry, in the war of 1812, and was deposited by the War Department in the office of the Commissioner of the General Land Office, under the regulations governing the same; that it remained DORMANT in said commissioner's office UNTIL AFTER THE DEATH OF URIAH W. in 1834, and until the passage of the act of Congress of

date July 27th, 1842. Under this act it was REVIVED and a "certificate of re-issue" was granted upon the application of Henry Johnson, (present defendant in error,) acting as guardian for Calvin Skinner, (sometimes called Henry C.) said Calvin being the only heir of the deceased, Uriah W. This certificate of re-issue, so granted, was by him, said guardian, transmitted to Wm. McNair, the then Register of the U. S. Land Office at Fayette, Mi-souri, in 1846, (who was also the agent of said guardian) for the purpose and with instructions to convert said warrant and certificate into money for the purpose of educating said Calvin and for his benefit. That as to whether the parties who managed the business of locating said warrant, intended to locate it in the name of Calvin or Uriah W. his father, plaintiff in error, had no knowledge, but averred that it was their intention and design to locate it to the use and benefit of the said heir, for the sole purpose of converting the warrant or certificate of re-issue into money for his use and benefit. Averred that in pursuance of such design so to convert said warrant into money, by Johnson, the guardian, and McNair his agent, said McNair sold said warrant and certificate to one James C. Goode for two hundred dollars cash, the full value thereof, and agreed to locate said land with said warrant for the use and benefit of said Good, who had at that time possession of said land and had a valuable improvement upon it, and had made said improvement upon and had possession of said land before it was brought into market by the United States; And in confirmation of said understanding and purpose, it was agreed between said McNair and Goode that the legal title to said land acquired by the location of said warrant should secure to and be conveyed to said Goode. Averred that said Calvin Skinner at the time

of the granting of said certificate of re-issue of said warrant, under the act of Congress of July 27th, 1842, by virtue of said re-issue was the legal owner and beneficiary thereof, and by the location acquired the full (legal) title of the United States to the land in controversy; which title so acquired, plaintiff in error claims by regular conveyance from said Calvin to said James C. Goode, and from Goode to plaintiff in error; that under color of this title, plaintiff in error and those under whom he claims have been in the actual, notorious, continuous, adverse possession of said land for more than twenty-five years before the commencement of this suit; wherefore he claimed that defendants in error were barred of a recovery in this suit by the statute of limitations; plaintiff in error further pleaded that said Goode paid to said McNair the said sum of two hundred dollars, purchase money agreed to be paid as aforesaid, for the use of said Calvin Skinner; that said McNair transmitted the same to defendant in error, Henry Johnson, who was then and there the guardian of said Calvin, in Halifax county, North Carolina, who received the same as guardian, accounted for and paid to, and for the use of said Calvin two-thirds of the sum remaining after paying to the said McNair the expense of locating said warrant and selling the same; the other third part of said money he retained for the use and benefit of Priscilla, his wife, as her supposed dower in said money and warrant. Plaintiff in error denied that he claimed the title to the land in controversy, under and from Uriah W. Skinner, but under Calvin Skinner; denied that said Priscilla was entitled to dower in the land.

To this answer was a general replication, denying all the facts alleged in the answer, except that portion of said answer pleading the statute of limitations, which was stricken out by the court, against the will of

plaintiff in error. Upon these pleadings, the case was submitted to the court sitting as a jury, for trial, and after hearing the evidence, the court rendered judgment, refusing to allow dower to said Priscilla. The case was appealed to the Supreme Court of the State by defendants in error, and upon a hearing, that court reversed the decision, and judgment of the Circuit Court, and rendered judgment, giving defendant in error dower in the land in controversy. From this judgment, plaintiff in error, prosecutes to this court his writ of error, and insists that the judgment of said Supreme Court was erroneous and should be reversed, and the judgment of the Circuit Court sustained.

POINTS OF DEFENCE

The main points relied upon by plaintiff in error, to sustain his defence, are:

1st.

That James C. Goode, his grantor, held, his heirs and assigns, still hold, under the pre-emption laws of United States, a prior equitable right to the land in controversy, (which he has never forfeited,) arising from settlement, improvement and cultivation, prior to its being offered for sale by the United States.

2d.

His grantor, James C. Goode, bought the fee title thereto of the United States, through Calvin Skinner, by the use of a land warrant located thereon by his guardian, in good faith and for full value, believing that he was getting full title without having any knowledge or information that there was a widow living, in whom dower in his land, so bought and paid for, would vest, that if the widow was entitled to dower she is barred and stopped by failing

to assert he right for twenty-five years, and further by reason of receiving one third of the proceeds arising from the sale of said Military land claim.

3rd.

Although the land warrant may be considered as partaking of the character of real estate and be so considered by the Laws of Congress while Uriah W. Skinner lived, yet, it is insisted that it was not that kind of real estate contemplated in the Dower law of 1825 of Missouri and evidently it was not land.

4th.

Uriah W. Skinner was not, during his marriage with Priscilla, seized of an estate of inheritance or any other estate in the land in controversy, and the location of the land warrant upon it by his son after the death of Uriah W. did not constitute it REAL ESTATE of which Uriah W. could be seized during his life so as to ent tle his widow to dower in it under the law.

5th.

This land warrant was to no specific land and did not designate any in which a fee could vest; it was a mere right or privilege given by the United States to Uriah W. Skinner to locate 160 acres of the unappropriated public lands, subject to private entry, to which the right of pre-emtion had not attached and could not interfere with a settlement. Of this privilege said Uriah never availed himself during his life, (the offer never was accepted) after his death Congress granted a similar right or privilege to his heir (Calvin) of which he through his guardian availed himself in 1847, and located or entered the land in question by his guardian—this was a new and independent grant to the heir entirely dis-connected from the offer made to the father, not an inheritable right vested in his father, and transmissible by descent, and

plaintiff in error holding a warranty title in fee deduced by purchase from Calvin Skinner, for value, his mother Priscilla, as widow of Uriah W. cannot have dower in the land. In this proposition is considered the warrant and certificate of re-issue together.

SUMMARY OF EVIDENCE.

The evidence adduced upon the trial, proves:

That, under the second section of the act of Congress, passed May 6th, 1812, the Secretary of War, in conformity to the act of 24th of December, 1811, and January 11, 1812, granted a land warrant to Uriah W. Skinner, dated May 27th, 1829, which entitled him to locate 160 acres of the public land, "to be located agreeably to said act, on any unlocated tracts of the six million of acres appropriated by law, for original grantees of such military warrants," etc. (See record 7 and 8, and copy of warrant.) That Uriah W Skinner, before locating said warrant, died in the year 1834.

That Henry Johnson, co-defendant in error, was appointed guardian of Calvin Skinner, in May, 1844, by the court having probate jurisdiction in Halifax county, North Carolina, and that Calvin was the only child and heir at law of Uriah W. Skinner. (See page 34).

That Henry Johnson, as such guardian, by his power of attorney, dated May 22, 1844, appointed Capt. Henry Garnett, attorney in fact for him, as guardian to PROCURE THE RE-ISSUE of SAID LAND WARRANT No. 26,198, which had been granted to Uriah W to be re-issued for the benefit of his ward, Calvin Skinner; to this power of attorney, was attached the certificate of Henry J. Hervy, a Justice of the Peace at that time, to the affidavit of Wm. Fawcett, date May 29th. 1844, made to aid said Johnson as guardian, in procuring the certificate of re-issue to and in behalf of said Calvin. (see pages 33-34; also, page 35). This Hervy is the same party who now holds a power of attorney to prosecute, and is prosecuting this suit for dower, executed by Henry Johnson, said guardian—Priscilla, the former widow, and Calvin, sometimes called Henry C. Skinner. (See p 38.) The certificate of re-issue was procured by Johnson. as guardian

That the land in controversy, at the death of Uriah W. Skinner, was not (surveyed), brought into market by the Government of the United States, was first offered for sale, commencing December 25th, 1846, continuing Jan, 1847. See evidence of Abner Gilstrap, page 23. (The Court is also referred to the proclamation of the President, in 1846, and the plat of survey, filed in the General Land Office, of which the Court will take judicial notice).

That before, and at the time this land was brought into market and first offered for sale by the Govern-

ment of the United States, James C. Goode, (grantor of plaintiff in error), had upon it a settlement and improvement, which he occupied by a tenant, and cultivated, holding it under a design to secure it as a homestead, under the pre-emption laws of the United States. See evidence of F. Rowland, page 23.

That the land warrant or certificate of re-issue, located upon said land, was in the possession of one William McNair, the Register of the United States land office, at Fayette, Missouri, at the time Goode went there to secure his land or pre-emption claim, which was evidently sent to him by Henry Johnson, the guardian of Calvin Skinner, who owned it at the time; sent to McNair for the evident purpose, (as gathered from his declarations and actions), of converting the same into money for the benefit of his ward, Calvin, and in order to effect that object, he applied to said Goode for the PRIVILEGE of locating his land therewith for Goode, assuring him no doubt, that it would be as good as so much money, and for accommodation to said McNair and said minor he was induced to allow said certificate to be so located under the further assurance from McNair, that said Goode should get as good a title as though he paid two hundred dollars cash, and instead of Goode paying the money for the land into the receivers hand, he paid it to McNair, the Register and agent of said minor and guardian, for his land, and said McNair undertook to procure the title for Goode, through the location of the certificate aforesaid, and his subsequent proceedings. This land was subject to entry by Goode, and no other person, at the price of one dollar and twenty-five cents per acre, and that was the full maximum value of the land warrant or certificate of re-issue, and was above its market value—that, as a means to carry out in good

faith, the contract made with Goode, NcNair, said register, became curator of said Calvin Skinner, duly appointed as such, by the County Court of Howard county, Missouri, and as such, went through the form of selling said land, (ostensibly for the purpose of educating said ward), and made a sale nominally of the land to Goode, and made to him a deed, purporting to convey to him the "whole" of said "premises," instead of attempting to make an assignment of said warrant or certificate, [and these transactions appear to be stamped with good faith, upon the part of Johnson, the foreign guardian, McNair, the register and local curator, and Goode, the settler]. The proceeds derived from these transactions, received from Goode, [two hundred dollars.] were duly reported by McNair, the curator, to the proper court, and after paying the expenses attending these transactions, he settled with the Howard county Court as follows:

December 8th, 1847, to amount of inventory,	$200 00
Credit by clerk fees,	$ 2 75
By commission and expenses,	24 00
Balance due ward	$173 25

[See page 32.]

This money was ordered by the court to be paid over to Johnson, the guardian of Calvin, in North Carolina, and at the February term 1848, of the Howard county court, appears the following order: "William McNair, curator of Calvin Skinner, presented a receipt in full of the amount in his hands from Henry Johnson, guardian of said minor, in North Carolina. He is therefore discharged. See record, page 22.

There is no evidence contradicting the fact that all the money received by McNair from Goode, except the expenses aforesaid, went into the possession of

Henry Johnson, guardian of Calvin Skinner, and husband of Priscilla at that time. The evidence is conclusive that he received it.

That, on the 22d of February, 1848, Henry Johnson, said guaodian, reported to the Probate Court of Hallifax county, North Carolina, and charged himself as follows:

"To cash on hand, received February 11, 1848, for military bounty land sold, in State of Missouri, ... $114 35.
Interest on the same to this 27th day of Feb. 15.

$114 50.

N. B. (Add 1 per cent. exchange on N. Y. on $114 35,—$1 14 —$114 35=115 49). This amount lacks but one cent of making precisely two thirds of the amount of money he received from McNair, curator. (See page 26.)

This leaves in his hands one-third, or fifty-seven dollars and seventy-five cents, belonging to his wife, out of said sale money, which neither of them attempts to account for.

Mrs Johnson does not deny that her husband received this money, or that they used it for their support; neither do they attempt to explain his possession of said money. Question No. 9, in her deposition, is framed with care to avoid this fact, and not to direct her attention to the fact as to whether her husband for her received one-third of the proceeds of this military claim, sold in Missouri.

It appears that Priscilla knew nothing about a land warrant issued to Uriah W. she admits that she had some conversation about some land in Missouri with her former husband Uriah W. "don't exactly remember what it was."

This warrant laid dormant in the office of the land

department at Washington not delivered to or received by Uriah W. Skinner up to his death and remained unlocated and designated no particular tract tract of land which to locate. Uriah W Skinner, lived and died in North Carolina; never was in Missouri, never occupied, and never saw the land in controversy, nor did one of his heirs or widow occupy this land

Neither Goode nor plaintiff in error had any knowledge or information that there was any widow of Uriah W. Skinner in existence, until the commencement of this suit; but they bought said land in good faith, and expended their money upon it, so as to make it valuable, and a town has been built upon a portion of it, and it became valuable under the notice and silence of defendants in error, and after twenty-five years silence, they seek by a mere technicality, to get this land and keep Goode's money.

Twenty-five years ago, nearly, defendants in error possesed all the means of information touching the location of this warrant upon the land in controversy, the character of the land, its improvement by Goode, that they had when this suit was commenced; yet the evidence shows that they lay by and have allowed the land to become valuable by Goode's labor and evpenditure as well as plaintiffs in error, and now after Goode's death and McNair's death, and after defendants in error have expended Goode's money, paid for the land, now they make the unjust demand for one-third of this land and improvements and keep all the money Goode paid for it.

Goode and plaintiff in error have occupied, and cultivated said land, continuously since 1846, claiming the title thereto, under Calvin Skinner's deed, and the law of Congress giving the right of location to Calvin, and Goodes pre-emption.

Goode had a valid pre-emption claim upon this land at the time it was brought into market (which no one could take away until he abandoned it or did some act whereby to forfeit said right), and this warrant or certificate under the law of its issue and the instructions accompanying it could not be located upon Goode's land without his consent, and this consent was given under pledge and faith that through the arrangement shown in evidence he would receive the full title to his land; and if dower he allowed here it would operate as a great fraud upon Goode and his grantee, and is without merit in defendants in error. McNair, the curator, made two deeds to Goode: the first was defective and did not carry out the contract made between Goode and McNair, and Goode did not accept it, although it appears of record, and hence the making of the second deed read in evidence by plaintiff in error, upon which he relies for title (see p. 12) this latter deed purports to convey the "ENTIRE above described premisis,' with appurtenances, and does not give an intimation that there was any advetse claimant.

ASSIGNMENT OF ERRORS.

The Supreme Court of Missouri erred in this case in the following points:

1 In deciding that Calvin Skinner the original grantor under whom plaintiff in error derived his title to the land in which dower is demanded, took the title by descent from his father Uriah W. in virtue of the several acts of Congress refered to in the record and proceedings to this case.

2 In deciding that Uriah W. Skinner, the father of Calvin, although dead, when military land warrant 26,198 (war 1812) was located upon the land in controversy, yet when located thereafter by his son Calvin, under act of July 27, 1842, the fee to the land thus located vested in Uriah, the dead father by *relation* so as to entitle his widow Priscilla, defendant in error, to dower in said land.

3 In deciding that said military land warrant *before located* was *real estate* within the meaning of the dower laws, and that the widow was entitled to dower in the land thereafter located with such warrant although located many years after warrantee's death, and although no settlement, or other act was done by the government or warrantee or any one else for him to designate or set apart said land to his use.

4 In deciding that the act of Congress of July 27, 1842, did not *vest* the title to the land to be located by said land warrant, in Calvin Skinner free from the claims of Priscilla for dower.

5 In ignoring the equity of J. C. Good the settler on the land located at time of location, which he was entitled to as such *under the* pre-emption laws of 1841 and instructions and rules of the land Department of the United States, under whom plaintiff in error gets his *title* and who has continued said Good's settlement on said land.

6 In deciding that Calvin Skinner takes title to this land by descent.

7 In overlooking the fact that the act of July 27, 1842, was a new act, (5 stat. U. S. p. 497) and operated as a new grant to Calvin in case his father Uriah was dead and under this act *he was entitled* to *enter* 160 *acres of land called for in the warrant issued to his father.*

8 In deciding that the act of July 27, 1842, did not vest the title, (so far as that act could) in Calvin in lieu of his father Uriah W., who was dead at its passage.

9 In deciding that the act of Congress 5, U. S. stat. 31, (which declares that the

title shall enure to and become *vested* in *heirs* of deceased patentee &c.) vested the title in the heir subject to the widow's dower, notwithstanding not located before the death of the warrantee.

10 In deciding that Uriah W. Skinner, although long before deceased, was *seized during* his life of an estate of inheritance in the land, so as to entitle his widow to dower.

11 In deciding against the title of plaintiff in error derived from J. C. Good, who was a *bonafide* purchaser from Calvin Skinner through his guardian McNair, who procured the location of the warrant by his guardian for his own use under the act of July 27, 1842 and other acts and resolutions of the Land Department.

MATT H. CARPENTER & B. G. BARROW, of Counsel
for Plaintiff in Error.

ARGUMENT.

The dower law of 1825, in Missouri, which was in force when Uriah W. Skinner died, found on page 332, revised statutes, 1825, is as follows:

"SEC. 1. That every widow of any person who shall hereafter die, shall be endowed in the lands, tenements and hereditaments and other real estate, *lying and being in this State*, whereof her husband, or other person, to his use was seized of an estate of inheritance in law or equity during the coverture, (to which she shall not have relinquished her right of dower by deed duly, executed and acknowledged in the manner which is or may be prescribed by law for that purpose,) to hold during her natural life."

The 10th Section of the Unitod States pre-emption Law of Sept. 4, 1841, provides: "That from and after the passage of this act every person being the head of a family, or widower, or single man over the age of twenty-one years, and being a citizen of the United States * * * who since the first day of June, 1840, has made or shall hereafter make a settlement in person on the public lands to which Indian title had been at the time of settlement extinguished and which has been or shall have been surveyed prior thereto, and who shall *inhabit* and improve the same and who has or shall erect a dwelling thereon shall be and he is hereby authorized to enter with the register of the land office for the district in which such lands may lie, by legal subdivisons, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States *the minimum* price of such land, subject to the following limitations and exceptions; no person to be entitled to more than one pre-emption right; no person entitled who is proprietor of three hundred and twenty acres of land; no person entitled who shall abandon his own land to reside on public land." The 13th section prescribes what oath the claimant shall take upon making his entry. Under act of Congress of June 1, 1840, pre-emptions are granted to settlers occupying by *tenant*, right continued till the 22d of June, 1842. (See Lester's land laws, page 70).

In virtue of this pre-emption law, James C. Goode was entitled to its benefits as a settler, which none could take away from him, and he had an equitable title in which he should be protected, as also

his heirs and assigns. The Supreme Court, in Lytle vs. the State of Arkansas, (9, Howard's, 333,) says: "The claim of pre-emption is not a mere *shadowy* right, which by some it is claimed to be; until sanctioned by law, it has no existence as a *substantive* right, but *when covered by the law*, it becomes a *legal right*, subject to be defeated *only* by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous *pioneer*, who is found in advance of our settlements, encounters many hardships, and not unfrequently, dangers from savage incursions. He is generally *poor*, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favortie spot selected by him, not to exceed one hundred and sixty acres." On this subject, Mr. John Y. Mason, Attorney General, in his official opinion, given to the Secretary of the Treasury, bearing date, April 25th, 1846, says: "The object of the law is beneficent, and it is entitled to a liberal construction in aid of the ends to be attained, But, to accomplish this, such a construction must be given as will protect the *settler* in his ultimate *right*, first, for thirty days from the date of his settlement, and second, for twelve months from the same time. The settler is entitled to this protection against the claims or entries of others. *From* the *moment*, therefore, that he *enters* in person, on land open to such claim with the *animus manendi*, or rather, with the intention of availing himself of the provisions of the act referred to, and does any act in execution of that intention he is a settler. He must give his notice afterward, inhabit, improve and pay, &c., to perfect his right, but in every stage he is protected until he fails on his part to comply with the conditions of the law." Mr. Zabriskee in his valuable collection of land laws and instructions (p. 27) says: "The foregoing authorities taken in connection with numerous decisions of the Supreme Court of the United States * * * would seem to *establish* the proposition that the moment a settler enters upon the public land open to such a claim he secures a preference right to that land against all the world including *Congress*." The Supreme Court of Alabamas Cruise *vs* Riddle (21 Ala. 791) decides: "That the act of Congress, 1847, conferring bounty lands on soldiers, was intended to *protect* not only *pre*-emption claimants, but also those who were in the actual settlement and cultivation of public lands without a pre-emption right." The law of the United States Feb. 11, 1847, * * * * * * * * expressly forbids the location of a land warrant "upon any lands to which there shall be a *pre-emption* right, or upon which there shall be an *actual settlement* and *cultivation*." See also circular No. 604,

June, 3. 1847, to Registers and Receivers, found in "Lesters Land Laws" p. 576.

The pre-emption title of Goode was recognized under the laws of Missouri as well as of the United States; under the former he could maintain ejectment. See Revised Statutes Mo., 1845, p. 440, which reads: "The action of ejectment may also be maintained in all cases where the plaintiff claims the possession of the premises against any person not having a better title thereto, *under* or by virtue of a pre-emption right under the laws of the United States."

The warrant by which the land in question was located and the instructions under which the location was made forbade, its location upon this land to which "a pre-emption right had attached" and upon which there was at the time an actual *settlement* and *cultivation* by Goode, within the meaning of the law, (see record p. 35-36-37.) By this location, Goodes equity was not destroyed and may here be examined and he may be protected against even a patent to another. In case of Henry Brush *vs* John H. Ware et al, (15 Peters U. S. p. 93) Mr. Justice McLean says: "The court can go behind the patent and examine equities that are asserted in the bill." on p, 107 he continues, "A patent appropriates the land called for and is conclusive against the rights *subsequently* acquired. But where an *equitable right* which *originated before* the *patent* whether by *first entry* or *otherwise*, is asserted it may be examined." "This controversy does not arise from adverse entries but between claimants under the same warrant."

Goode consented to the location of this certificate upon his pre-emption claim and improvementonly for the purpose of securing a full legal title to his land and if he failed without his fault it worked a fraud upon him and the location did not destroy his equitable right; he was entitled to his land over all others upon paying two hundred dollars, in gold, silver, warrants, script, or floats, and this payment was all that was necessary to make his title perfect in law, as well as in equity. At the time of the entry of the land Goode had, and his assigns still have, the full equitable title to the land, beginning with his settlement as a pre-emptor, and only subject to the payment of two hundred dollars to perfect his title. Goode and his assigns have been in the actual, continuous occupancy of the land since the first settlement by Goode, and still are—hence this preference right still remains. Goode made payment of this two hundred dollars to McNair, the register of the land Office and proper representative of the owner and custodian of the land warrant and certificate of re-issue; and McNair, the register, instead of granting a certificate of entry to Goode, for his money, he paid the Govern-

his heirs and assigns. The Supreme Court, in Lytle vs. the State of Arkansas, (9, Howard's, 333,) says: "The claim of pre-emption is not a mere *shadowy* right, which by some it is claimed to be; until sanctioned by law, it has no existence as a *substantive* right, but *when covered by the law*, it becomes a *legal right*, subject to be defeated *only* by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous *pioneer*, who is found in advance of our settlements, encounters many hardships, and not unfrequently, dangers from savage incursions. He is generally *poor*, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favortie spot selected by him, not to exceed one hundred and sixty acres." On this subject, Mr. John Y. Mason, Attorney General, in his official opinion, given to the Secretary of the Treasury, bearing date, April 25th, 1846, says: "The object of the law is beneficent, and it is entitled to a liberal construction in aid of the ends to be attained, But, to accomplish this, such a construction must be given as will protect the *settler* in his ultimate *right*, first, for thirty days from the date of his settlement, and second, for twelve months from the same time. The settler is entitled to this protection against the claims or entries of others. *From* the *moment*, therefore, that he *enters* in person, on land open to such claim with the *animus manendi*, or rather, with the intention of availing himself of the provisions of the act referred to, and does any act in execution of that intention he is a settler. He must give his notice afterward, inhabit, improve and pay, &c., to perfect his right, but in every stage he is protected until he fails on his part to comply with the conditions of the law." Mr. Zabriskee in his valuable collection of land laws and instructions (p. 27) says: "The foregoing authorities taken in connection with numerous decisions of the Supreme Court of the United States * * * would seem to *establish* the proposition that the moment a settler enters upon the public land open to such a claim he secures a preference right to that land against all the world including *Congress*." The Supreme Court of Alabamas Cruise *vs* Riddle (21 Ala. 791) decides: "That the act of Congress, 1847, conferring bounty lands on soldiers, was intended to *protect* not only *pre*-emption claimants, but also those who were in the actual settlement and cultivation of public lands without a pre-emption right." The law of the United States Feb. 11, 1847, * * * * * * * expressly forbids the location of a land warrant "upon any lands to which there shall be a *pre-emption* right, or upon which there shall be an *actual settlement* and *cultivation*." See also circular No. 604,

June, 3. 1847, to Registers and Receivers, found in "Lesters Land Laws" p. 576.

The pre-emption title of Goode was recognized under the laws of Missouri as well as of the United States; under the former he could maintain ejectment. See Revised Statutes Mo., 1845, p. 440, which reads: "The action of ejectment may also be maintained in all cases where the plaintiff claims the possession of the premises against any person not having a better title thereto, *under* or by virtue of a pre-emption right under the laws of the United States."

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ment for Goode's land, Calvin Skinner's land warrant, and Calvin Skinner's proper representative, got in Goode's money from McNair, a full equivalent for said warrant. This money, after paying expenses, was all paid to Henry Johnson, in trust for the person to whom the warrant belonged, and he is yet chargeable with it to those for whom he received it. Goode paid this money for a *full legal* title to the land in controversy. Mrs. Johnson, through her husband, received one-third of the money, and now claims one-third of Goode's land and improvement, and makes no offer to return Goode's money! If this land truly belonged to Uriah Skinnner, and he, or any one for him, had received the value for it in money, upon a contract of sale with Goode, equity would compel a conveyance of the full title to the land by Skinner, including the dower of his wife. A great fraud would result to hold that the location of the warrant by McNair, curator of Calvin Skinner, located for Calvin, divested Goode of his pre-emption right, his equitable right and improvements, under the circumstancies detailed in evidence, such must inevitably be the result if the judgment of the Supreme Court of Missouri be sustained in this case. Admit, for arguments sake, that Goode, McNair and Johnson, were all mistaken, and that none of their acts given in evidence, surveyed to Goode the legal title or his assigns; what then? Where is the title Goode once had, as a settler under the pre-emption laws, and what right did the widow of Uriah W. Skinner aquire under the proceedings? It was a *trust* alone, and contained the title of the United States, and no more, and *that* on the payment of two hundred dollars was ended, and the title was held in trust for Goode, who paid the money, and not for Uriah's widow. If Goode's money was improperly paid and lost, then to perfect his title under the pre-emption law now, it would only be necessary to pay the Government two hundred dollars to complete the title, and the title held in Skinner being only in trust, dower cannot attach to the land so held. Again, suppose in this case, that Goode, before doing all the acts necessary to complete his title under the pre-emption law, had died; the land would have gone to his heirs, free from the dower of his wife. See (Wells guardian vs. Moore, 16. No. rep. 478).

In case of Firestone vs. Firestone, (2 Ohio State rep. 417), the learned Judge, in delivering the opinion of the court, says: "Although the policy of the law has always been to preserve with great care, the right of dower when it has once attached to the property of the husband, yet it has never gone so far as to attach the right of dower to property other than the husbands; whilst it is very reasonable that in case of death of the husband a support for the wife should be provided out of his estate; it is neither *reasonable* nor *legal*

that such support should be provided out of the *property* or *rights* of *others*. In order to avoid this it is necessary that the *right* of dower should attach *subject to all the equities* that may *exist against the title of the husband* at the *time it attaches*. *The right* of dower *arises alone* upon the title of the husband, and cannot be higher or more extensive than it. If the *legal title* be in the *husband* and the *equitable* title in another at the time of the *marriage*, *no right* of *dower* attaches as against such *equitable title*." Also, see Lamb vs. Davenport, U. S. Supreme Court, Oct. term, 1873. 18 Wall 307

II.

The second proposition, that Goode bought the fee simple title of the U. S., through Calvin Skinner, by the location of a land warrant by his guardian, in good faith, under the belief he was getting a full title to his land, we think is abundantly sustained by all of the evidence. His deed from McNair purported to convey "the entire above described premises." (see record, page 12). The whole matter was either a *bona fide* proceeding, made by Johnson, the guardian, McNair, the Register and local curator of Calvin, arranged and assisted by Hervy, the present attorney in fact, with the knowledge, no doubt, of Priscilla, the mother of Calvin, and wife of Henry Johnson, or it was a gigantic swindle, concocted by them to defraud Goode of his money and the improvements which he had made upon the land, and in either view, he is entitled to the protection of the court in this case. There is no evidence that Goode was informed that Uriah W. Skinner had a widow: the record and proceedings connected with the warrant, location, re-issue, sale and conveyance of the land, fail to disclose the fact; but on the contrary, would lead him to believe there was none, and the means of knowledge accessible to ascertain such fact were meager when we remember that she lived in Halifax, North Carolina and Goode lived in Adair Co., Mo., and when no railroad or telegraph or even stage coaches, except to a very limited extent, were used in Mo., and mails from Washington City were received in Missouri probably not more frequent than once a month; and further when no right of a widow was spoken of while Goode lived, and for fifteen years thereafter. All these facts taken together, tend to the almost certain conclusion that Goode had no idea that there was any widow to take one-third of his land from ~~his~~ his family after his death, and no presumptions of notice of that fact can be indulged in properly, in view of all the facts.

If the defendant in error were entitled to dower in this land, plaintiff in error insists that she is debarred and estopped from now claiming it as against plaintiff in error after twenty-five years silence, and although there appears to be no legal bar by statute of limitations to suits for dower, yet it is urged that the Courts should in such cases as the one at bar, interpose an equitable bar for the protection of *bona fide purchasers*, and especially the counsel for plaintiff in error, invoke the bar of estopel against this claim. In case of Wiseman vs Masy, *et al*, (20 Ind. 239), the court say: "Where

a guardian, who is also the mother of her ward and owns a dower interest in the ward's real estate, applies for a sale of her ward's real estate, describing it as the entire title, and says nothing in any way in her proceedings of her own interests, and an order is made for its sale in that way, and she makes the sale and completes the proceeding without giving any *notice* or *intimation* of her *interest*, she will be *forever estopped* to claim any such interest." Also, in case of Gatling vs Rodman, *et al*, (6 ind. 289), the Court say: "If a person owning an interest in land, and being fully apprised of his rights, stands by and allows a third person to become the purchaser, knowing that he is ignorant of such rights, and suffers him to improve the property, under the belief that his title is valid, the person owning such interest. (even though an infant or married woman), is guilty of a fraud and will be estopped afterward from asserting such interest against the purchaser; the phrase "standing by," in such case does not import actual presence, but knowledge under such circumstances as render it the duty of the possessor to communicate it." To the same effect is Story, Esq., jurisprudence (Vol. 1. Sec 385) also authorities cited in Gatling vs. Rodman et al (ante) Also Dougray vs Topping 4 page 94; also, McNees vs Swaney; 50 Mo. Rep: 388; upon this point. In case of Fletcher vs Holmes, (25 Ind. pp· 458. 770.) the court say: "That a mere failure to give notice of a right, where another, without knowledge of the fact, is investing his money, and where it may be fairly concluded that he would not do so if informed of the fact, will generally preclude a subsequent setting up of the claim thus concealed.

But it is insisted that defendant in error is debarred of her right of dower in this case by reason of her receiving one-third of Goode's money, paid by him for this "military land claim," spoken of. They deny that she received this money: we insist that she did receive it. The evidence and actions of all the parties shown in evidence, clearly establishes the fact to our minds that they considered this land warrant and certificate of re-issue. personal property of which they desired to make a a disposition for money, not for land, and the idea that it was real estate, never entered their minds. The location of the warrant became a necessary act in the use of the means adopted for converting the claim into money; and the sale by McNair, the curator, can be accounted for upon no other reasonable hypothesis, taken in connection with all the facts. After he had realized two hundred dollars cash for this claim, he made report of the proceeds to the Howard County Court and charged himself, as curator, with the whole amount. (See record, p 32). He credited himself by commissions and expenses, twenty-six dollars and sexenty-five cents,

leaving a balance of one hundred and seventy-three dollars and twenty-five cents. This amount found due, he was ordered to pay to the guardian of Calvin Skinner, in North Carolina, and on the 8th of February, 1848, he presented to said Howard County Court a *receipt in full* of the amount in his hands from Henry Johnson, guardian of said minor, in North Carolina, and was discharged." (See record 33). Now, on the 11th of February, Henry Johnson received this money as guardian, and on the 22th of February, 1848, he made settlement with the Probate Court of Halifax county, North Carolina. (see record, page 26). In this settlement he reports to the Court as receiving for said ward, for military bounty land, sold in the State of Missouri—one hundred and fourteen dollars and thirty-five cents. (Same page.) Why report only $114,35? Because, if we add to that sum one per cent. for a draft on New York, (in which way money then was transmitted by business men such great distances), and we have an amount which is within a fractional part of one cent of precisely two-thirds of the money received on the sale. Why report only two-thirds? Because under the law, his wife, Priscilla was entitled to one-third of the property of her husband as dower, and Johnson, her husband, kept this one-third out of the money received for the ward, as his wife's share, (dower). This proposition is not denied by Johnson or any one else, in the evidence, and it is as clear as anything can well be. But counsel may say Priscilla, Johnson's wife, did not receive this one.third. We reply Johnson, her husband, did, and it being money belonging to his wife as soon as he obtained possession of it, it was her possession *in* law and he had a right to use it thereafter as his own. See Schouler's Domestic Relations. Chap. V. pp 111, 117, 121; also, Chap. VI. p. 137, at bottom; also, I. Bright Hus. and wife, 34, 35; Legg vs Legg, 8, Mass. 99; Lamphere vs Creed, 8, Vesey 599: Sallec vs Arnold, 32 Mo. 532; [redacted] vs Cody, 29, Geo. 117. Roll. Abr. 342,350.

If Johnson did not receive this money as indicated and for the purpose stated, wherefore his silence upon the subject. He is the only living witness who knows the facts, and the interest of his wife in this case, as well as his peculiar *relation to* these parties, demand that he should explain away this state of facts, if they be untrue. There is a fact a little remarkable in this case, and that is, that Johnson and wife should agree to give Hervy two dollars of what he might recover, they getting one; this shows that they had no faith in a recovery, and did not honestly believe they ought to recover,—but Hervy is willing and does undertake to take from Goode's heirs and assigns that which Hervy knows Goode paid for once, in part

through Hervy's instrumentality. Shame should blanch the cheek for such an unjust attempt upon the rights of the heirs of the departed, who once gave a full equivalent for that of which they are now sought to be deprived in this proceeding. The foregoing argument upon the second point is hypothecated upon the fact that Uriah W. was seized as required by law, and that his widow was entitled to dower, both of which propositions we deny.

III.

On the third proposition, that the land warrant was not such real estate as was contemplated by the dower law of 1825, upon which this claim is predicated, counsel for plaintiff in error submit, that the words "and other real estate lying and being in this State," are peculiarly significant, and when fairly construed, mean chattels real, or such property not land, as lies in this State, that is treated as landed estate, sold and conveyed as land; among such property were slaves at the time this law was enacted; it was something that could *be* or *lie* in this State, and such as was called real estate by our State laws. The term real estate as defined by the Missouri statutes. See Tit. Execution, Wag. Stat. 606. Sec. 17. Lease of an unexpired term of three years sold as real estate." Title Conveyances, p. 278. Sec. 33, term "construed as co-extensive in meaning with lands tenements and hereditaments, and as embracing chattels real! Title Judgments, p. 794, "contracted to include all estate and interest in lands tenements and hereditaments, liable to be sold upon execution." Be this real estate whatever it may, it must be property in which there is a seizin of *an estate* of *inheritance* in law or equity, by the husband during his life; it is not something merely ideal, but something tangible and substantial; something which can be handled and seen; something that commissioners appointed to admeasure dower, can examine, value and divide, first setting off the one-third thereof to the widow and divide the remainder among the heirs. This land warrant in kind might have been considered as real estate under the law of 1825, had it *been in the State*, but it was not, for it had not been issued at the passage of that law; consequently this dower law could not operate upon the warrant, rnd there is no evidence to show that this warrant was in this State till 1846, after the dower act of 1825, had been superceded by General Statutes of 1845, which makes no provision whatever for dower in "other real estate lying and being this State." This latter provision was left out of the revised statutes of 1835.

The act of Congress, passed June 3, 1858, declares land warrants to be *personal chattels*. See pamphlet 1862, page 41: "all such warrants, and all other warrants, issued pursuant to existing laws, shall be treated as personal chattels and may be conveyed by assignment," etc., and they have been used as such from the time the first

one was issued. Pamphlet containing pension laws, 1862, page 36. (Laws March 22, 1852), provide "That all warrants for military bounty land which have been or may hereafter be issued under any law of the United States, and all *valid locations* of the same which have been or may hereafter be made, are hereby declared to be assignable by deed or instrument of writing made and executed after the taking effect of this act, according to such form and pursuant to such regulations as prescribed by commissioner of General Land Office." This real estate (so called), the land warrant was never in Uriah Skinner's possession or *delivered* to any other person for his use; consequently no dower of his wife could attach under the laws of Missouri or any other State, even to the warrant. The Court below appear to have been misled by an idea that the warrant was real estate, for they say: "This warrant is real estate, commencing from its date and holding by relation from entry back to date of warrant, and therefore subject to dower of the widow in the land located by it." We ask, would it also act by relation and cut off the estate of Goode in this land derived from his settlement, and give a right to the wife of Skinner, which is expressly cut off from the wife of Goode? This would be a strange working of the law of relation. The law presumes many fictions, but this of *relation* never went that far before A warrant never could be real estate in fact, until it was located; it is like a note, a representative of value, and negotiable; one may be discharged in money, (so many dollars;) the other in land, (so many acres), and until located, warrants are *personal* and floating, and are subject to *Congressional Legislation*, are fluctuating in value, and in early days were bought and sold by settlers upon public land, sometimes for a cow and calf; sometimes for a pony, and sometimes for a wagon; always for a mere nominal price: and although not made assignable by law till 1848, yet they were sold and traded as other personal property; as remarked above, they were floating; they might be made to light and become fixed and stationery, and then become real estate; and when such warrant was located, its function and existence ceased, and from that time it was *real estate*, and belonged to the owner of the land upon which it was located; it became inseperable from and a parcel of the land upon which it was located, *tangible—real*—substantial—subject only to the wear of time. Suppose this land warrant had never been located at all, what would have been the rights of the widow in it? (~~the real estate~~). Suppose again that there had been no heir surviving Uriah W. Skinner, what would have become of this real estate (warrant) then? and under what law could the widow have received one-third of it as dower? Not under the law of Missouri, except treating it

as *personal*. If this warrant was not located upon the land in controversy, during the life of Skinner, then the warrant did not become merged in the land while he lived; hence, the estate in the land is not such as is contemplated by the dower law to give dower to the widow. As remarked before, this warrant was a *mere right or privilege* in Skinner, to locate 160 acres of public land within a certain district, (which never comprised the land in controversy;) this privilege he could avail himself of, and thereby procure 160 acres of land; if he failed so to avail himself of this right, while he lived, he got *nothing, much less an inheritable estate*. When he died, all the estate he received in the warrant, died with him, there being no law making that warrant transmissible to his heirs by descent, before located. If the widow, upon the death of the husband was entitled to one-third of the warrant, hers was an absolute title to it, and if she owned one-third of the warrant, and it was located upon land, in the hands of a purchaser with notice she could in equity follow the third interest into the land and procure a decree for one-third of the land; *not as dower*; but as *fee owner*.

Under the laws of Missouri, (See Sec. 68 and 69, Art. 2, "Administration Act.) it is provided, "That Probate Courts may order the sale of any land scrip or certificate of location issued by the United States, and such sale shall be on the terms and conditions as provided in case of sale of *personal property*."

The laws of the United States, Feb. 11, 1847, Pamphlet 1862. p 33, provide for the assignment of certificate and warrant, as follows: (Sec. 9.) "In the event of his children being minors, then the legally constituted guardian of such children, shall, in conjunction with such of the children, if any, as shall be of full age, upon being duly authorized by the orphans court, or other court having *probate* jurisdiction, have power to sell and dispose of such certificate or warrant for the benefit of those interested." Also, Act March 22, 1852, Id. Sec. 4, p 38. Id. Sec. 1, p 36. In Price vs Johnson, (1 Ohio State, 390), it is decided that "The holder of a warrant for lands in the Virginia military land district, *before location* or *entry*, has no such specific equity to any particular tract of land as a court of chancery can *notice* or *enforce*. Now, if Skinner, in his lifetime, had no specific equity as to any particular tract of land, as a court of equity can notice or enforce, then where is an equity upon which his widow can, after his death, predicate a claim for dower? Whatever equity he may have had under the warrant and laws of Congress, to procure land, this equity not having been merged into a specific tract, while he lived, his widow has no right in law or equity to something which during his life he never owned, and the doctrine of relation may be

invoked in vain to create such a right in his widow for dower in the land in controversy. The doctrine laid down in Firestone vs Firestone, (2 Ohio State 415, 417), will apply here with force. (supra).

This warrant was located 1847. How, then, could the estate obtained of the United States by such location, by relation, be made to vest in Uriah Skinner, who died in 1834, before these lands were surveyed by the Government, and by such relation, create such a seizin in the dead man as to give dower to his widow?! Reverting again to the law of 1845, as remarked, it is very different from that of 1825. Revised statutes, 1845, p 430, Sec. 1, provides: "Every widow shall be endowed of one-third part of all *the lands* whereof her husband or any other person to his use was seized of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower, in the manner prescribed by law, to hold and enjoy during her natural life." (This *is revised from Statutes of* 1835, p 227). We submit that as this warrant was not located till 1847, there was no designated estate in Missouri upon which this section could operate until the location; and then the rights of the widow in this land could not date prior to the divestiture of the title from the United States, which was February 11, 1847. If this view be correct, the dower in "*other real estate*," etc., as mentioned in the law of 1825, is effectually disposed of, and the widow cannot recover dower in any property except under the law of 1845, as above quoted. If this be correct, she can be endowed of *land only*, and as this warrant was not land at the death of Uriah Skinner, no dower can vest by reason of Skinner owning said warrant during his life. In conclusion upon this point we would again ask, was it the *land in controversy, which was the estate of which Skinner was seized* or was it a *mere paper*, authorizing him to have land if he woulds elect and locate it? The question suggests the answer to it.

IV.

The fourth ground of defense is, that Uriah W. Skinner was not seized during his life of an estate of inheritance in the land in controversy or any other estate to which his widow can have dower in said land; and that the location of the land warrant issued in the name of Uriah W. by his son Calvin, did not constitute it real estate of which said Uriah W. could be seized during his life so as to entitle the widow to dower under the Missouri laws. And because of the intimate connection between the 4th and 5th points, we will consider them together.

The latter part of this proposition is partially considered in the last point made. We think it is evident that the land warrant was not real estate, within the meaning of the dower law of 1825, of which Uriah W. Skinner was seized of an estate of inheritance, and it is not embraced within the provisions of 1845, unless by the doctrine of relation invoked in this case, the warrant located in 1847, upon land belonging to the United States, but never surveyed till 1842, after the death of Uriah W. in 1834, created a seizen in said Uriah W. within the dower law above referred to, which proposition we consider so far-fetched and so devoid of reason and authority, as not to be favorably entertained for a moment. We observe (supra) that the land warrant in 1847, and from that time ever since, has been treated as personal property, made assignable "according to forms and instructions prescribed by the Commissioner of the General Land Office," so as to vest the assignee with all the rights of the original owners of the warrant or location." (See Sec. 1, Act March 22, 1852.) The warrant or certificate also could be sold by order of the Orphan's Court by the guardian of any minor. (See Sec. 9, Act Feb. 11, 1847). The form prescribed by the Commissioner of the General Land Office for the assignments of warrants and certificates, of location, is substantially as follows:

"For value received, I, (A. B.,) to whom the within certificate or warrant, No. ———, was issued, (or assigned,) do hereby sell and assign the same to (C. D.,) of ————————, and authorize him to locate the same and secure a patent therefor. Witness my hand and seal ————————18—

Attest A B. [SEAL.]

E. F.——

G. H.——

This assignment was necessary to be made upon the back of the warrant or certificate, and duly acknowledged before an officer authorized to take and certify the acknowledgement of deeds to real estate, and the warrant or certificate thus assigned, was located in the name of the assignee and a patent for the land located, issued in his name. Certificates of location were assignable before the Register of the local land office under a form prescribed by the Commissioner, and a patent in that case issued in the name of the assignee of the location. Observe that neither an assignment of a certificate, land warrant or certificate of location contemplates that a widow of the original warrant or certificate of location shall join in the assignment, and relinquish her dower in the land located with the warrant, which, under the principles contended for by defendants in error, would be necessary to debar the widow of the assignee of dower in the land located. Such an intention as this never was entertained by Congress, and the theory assumed by defendants in error by such construction, has at least the merit of novelty in the adjudications of this country. Act of March 3, 1855 (U. S. Statutes p. 143,) provides "That said certificates or warrants may be assigned, transferred and located by the warrantees, their assignees or their heirs at law, according to the provisions of existing laws, regulating the assignment, transfer and location of bounty land warrants."

This land warrant had in it nothing substantial upon which to base an inheritable estate, and we contend that it was not inheritable within the meaning of the dower law or under the laws of the United States. It was a bounty granted by Congress to Uriah W. Skinner, the fulfillment of a promise that if he would serve his country in the army and was honorably discharged the Government would give him title to one hundred and sixty acres of land *within* a *certain district* of *country*, upon the Secretary of War *granting* or *issuing* to him a warrant, and upon the implied conditions, that he should receive the warrant and it should be located upon *particular land* while he lived: he served his country, the warrant was granted, but laid in the office not received nor located *while he lived* and the laws of Congress granting this bounty made no provision for it to *descend to his children*, *heirs* or *widow* (See acts Dec. 1811, 2d. Statutes at Large 669 and Jan. 11, 1812, 2d, Statutes. p. 672, Also act of May 6· 1812, 2d, Statutes, p. 728.) These acts make no provision whatever for an inheritable interest in the land warrant in question, for the simple reason that it was a *personal* bounty, dependent for its enjoyment by the Soldier upon the following conditions: He must enlist for five years—be mustered into service—serve faithfully and be honorably discharged, apply for a warrant

for one hundred and sixty acres of the six million acre reservation, provided for the satisfaction of such warrant, must be applied for within five years after the right accrued,) must be a drawing by lot for one of the quarter sections, thus reserved and, when so drawn a patent issues to him for the land so drawn. Now a failure to do any one of these acts, effectually defeats all claim to land under said acts of Congress. There was a failure by Uriah W. Skinner in the following points: He did not apply for a warrant within the time. He did not draw any land to which it could apply. The six million reservation and all others made for the satisfying of such claims were up before the warrant was located.

He never located it during his life.

The land upon which it was located was not a portion of the public lands surveyed and set apart for the satisfaction of this warrant It was located on a pre-emption claim and a patent never issued to him while he lived.

The above acts of Congress fail to make any provision for the descent of the land warrant issued under their provisions. The first mentioned act provides that the soldier "shall be *allowed* and *paid* in addition to the foregoing bounty ($16.) three months pay and *one hundred and sixty acres* of land" and further provides that the *heirs* of a soldier who shall be killed in battle or die of wounds, etc. "shall likewise be *paid* and *allowed* said additional bounty of three months' pay and one hundred and sixty acres of land;" in both cases the *land* "to be *designated, surveyed* and laid off at public expense."

The act of January 11, 1812, provides for the bounty of sixteen dollars to all who enlisted for five years, and when honorably discharged "*he shall moreover be allowed and paid* in addition to said bounty three months' pay and one hundred and sixty acres of land;" no provision is made for the widow or heirs of the Soldier, who *survives* the service, inheriting this bounty.

The act of February 6, 1812 (1 stat. p. 677) provides. "That the *heirs and representatives* of any soldier who may be *killed* in *battle &c. shall* be entitled to receive One Hundred and sixty acres of land to be designated surveyed" etc, The act of May 6. 1812 (supra) sec. 2. provides "That the Secretary of War shall issue warrants for the *military land bounties* to the *persons* entitled thereto by the two last mentioned acts (Dec. 1811 and Jan. 1812) either of them provided such warrants shall be issued only in the names of the *persons thus entitled*, and be by them or their legal representatives applied for *within five years after* the said persons shall have become entitled thereto," The third section, provides "Every *person* in whose favor such warrants have been issued shall on *delivery* of the same at

the office * * of Commissioner of General land office be entitled to *draw* by *lot one* of the *quarter sections* surveyed by virtue of the first section of this act in either of the said Territories, which the person in whose favor such warrant has issued may designate and a patent shall thereupon be granted to such person for such quarter section without requiring any fee therefor." These provisons as stated in said acts are "for the purpose of satisfying the bounty land promised by the United States by said acts to said *persons*;" such an idea as a grant to a specific tract is not in any of these acts, except within the 6,000,000 acres reservation as above.

The act of March 9, 1818, (stat. 408) provides "that the time for issuing Military land warrants by act of April 16, 1816 is extended till Oct 1, 1819," Act 26, May 1824 continued right to issue for five years). This right to issue warrants was continued under the acts of Congress till February 5, 1829, (stat. vol 4, p. 333). Uriah Skinner was then alive, the warrant was issued March 27, 1829. This act of Feb. 5, 1829, is as follows: "That an act to allow further time to complete the issuing and locating of Military land warrants approved May 26th, 1824 and also, the operations of the act approved May 24th, 1819, which by the said act of 1824 is revised be and the said acts are hereby extended and continued in force for the term of five years from and after the 26th day of May next." (1829). This five years *expired* May 26th 1834. Uriah W. Skinner died January 1834. From *May* 26, 1834, *till Jan.* 27, 1835 there was no law in force authorizing any location of this warrant and no law authorizing a descent of the warrant to the heir of the deceased. The right to locate this warrant limitation under act of 1829 expired on 26th May 1834, and Uriah W's. right to land which under the law could have been located with this warrant by him, died with him. No land could be selected by lot or otherwise by the Soldier and there was at his death no law authorizing any other person so to do in his place.

January 27th 1835 an act was passed reviving the above recited acts and allowing time for issuing and locating warrants for five years from 29th May 1834 (see stat. vol. 4, p. 749,). This right *expired* under this act on 26th May 1839. From 26th May 1839, till July 27, 1842 there was no law in force whereby this warrant could be located, and it had wholly ceased to have any vitality, and if it ever had been "real estate" within the dower law it had ceased to exist as such and by law was remitted to the estate it was in prior to the Soldiers birth. Now after the death of the warrantee and after the time provided by law in which to locate this warrant had expired by limitation of law and no person was living who could locate it upon land, where is the vitality in it to make it the subject

of an inheritable estate? And moreover from the act of 1811 till 1842 there was no provision of law for an inheritance or descent to attach to this warrant to the heirs and such thing as dower was not thought of. The act of July 27, 1842 under which this was finally located (see 5 stat 497,) was a new act, and does not purport to revive any former acts so as to cast an inheritance thereunder. The first section is as follows: "That in all cases of warrants for bounty lands for military services in the war of 1812 with Great Britain which remain unsatisfied at the date of this act, it shall be lawful for the person in *whose name* such warrant shall have issued, his heirs or legal representatives, *to enter at the proper land* office in any of the States or Territories in which the same may lie, the quantity of Public lands subject to private entry to which said person shall be entitled in virtue of such warrant." Section 2 provides: "That the patent shall in all cases issue in the name of the person originally entitled to the bounty land, or to his heirs or legal representatives." This act "renews and continues in force" an act providing for the issuring and locating of Military land warrants &c Under the provisions of this act upon application of Henry Johnson Guardian of Calvin, heir of Uriah, a certificate of right to locate this warrant was granted, not to Uriah the dead man but to his son and heir, dated 11th June 1844 (see record 8); endorsed on this certificate was a desire to locate the same on the land in question signed Wm. McNair Register, also certificate of McNair, of location was endorsed thereon, (see record 10). Was this warrant and certificate of location by the guardian real estate of which Uriah W. died seized, and was it an inheritable estate during the life of Uriah W. in which his widow could be endowed, as real estate or land under the dower law of Missouri? we think not. We will conclude this part of the argument by referring to the opinion of Mr. J. Y. Mason, Attorney General, dated July 14, 1846 as to pensions being inherited &c, he says: "By the provisions of these laws, care is taken to prevent the arrears of pensions in any case becoming *assets*," (the same provision is made in reference to bounty land under the acts referred to) for the payment of debts or for distribution according to any rule of descent or inheritance, except that prescribed by Congress—a power which belongs to the States, and is not conferred by the Constitution in regard to any vested right or chose in action. But the pension being a bounty conferred by Congress the authority exists to withdraw it or to prescribe the conditions on which it is to be paid and the person or persons who are to receive it."

Act of May 30 1830 provided "that all certificates or scrip to be issued in virtue of any warrant hereafter to be granted shall be *issued*

to the party originally entitled thereto or his heirs, or devisees as the *case may be.*"

We will particularly direct our enquiry as to whether Uriah W. Skinner was seized at all of this land in suit, during his life either in law, fact or equity. It is evident that he was not seized in fact, for he was dead (as before stated) when the land was surveyed by the United States, dead when the title to the land was divested of the United States. We contend that he was not seized in law or equity even "by relation" of such estate as to entitle his widow to dower. The claim is predicated upon the warrant and based upon the military services rendered by Uriah W. and defendants in error contend that Uriah was seized by relation, this doctrine we will examine hereafter, but here we remark that if that be true, it is not such a seizure as will give the widow dower in this, land for if seized at all it was for but a moment as a mere conduit to pass the title to the heir to whom the title enured by operation of law. See Stow vs Tift 15 Johns 462, Miller et al vs Wilson and others 15 Ohio 108, Rand and wife vs Kendall, ~~Ind 671~~. × 15 Ohio 671

The seizure of Uriah W Skinner at the time of his death, was in a military land warrant *only*, which was, at the time of his death in the office of the Commissioner of the General land office. This was the thing (call it real estate if you will) in which his widow had dower. She never sought dower in it hence her right was lost; it could not follow the warrant into land located with it and then recover one-third of the land as dower if she had dower in the warrant and it was used without her consent and land located there with, equity would decree her a portion of it in fee as before stated but not as dower—and in that case the question of innocent purchase, limitation, &c, might arise.

The kind of property of which the husband must be seized to entitle the widow to dower, is landed property, certain, specific tangible land, belonging to the husband at his death or belonging to him during his marriage. In case of Blood vs Blood (23 Pickering Mass.) the court say "the seizure must exist in the husband during marriage to certain lands", cites Litteton sec. 36 and says: "'Tenant in dower is where a man is seized of certain lands or tenements in *fee simple*, fee tail general or as heir in special tail, and taketh a wife and dieth, the wife shall be endowed of the one-third part of such lands and tenements as were her husbands, at any time during coverture. Mr. Justice Dewy delivering the opinion on p. 84 says: "It will be readily perceived that among the things essential to *create* the right of dower one is that the husband should at some period during the coverture be seized of the estate in which dower

is claimed &c,; in referring to Eldridge vs Forrest et al 7 Mass. Rep. 258 he says: "It was held that a legal seizure by the husband of a vested remainder is not sufficient to entitle his widow to dower." In Shoemaker vs Walder 2 Serg and Rawle Rep. 554, Mr. Justice Tilghman says: "By the common law there can be no dower unless the husband is seized *in fact* or in law of the freehold as well as the estate of inheritance during coverture," p. 556. "Dower must attach to the property of the husband, not that of another," see Firestone vs Firestone 2 Ohio Stat. 415, "The right of dower arises alone upon the title of the husband, and cannot be higher or more extensive than it," Id. "If the legal title be in the husband and the equitable title in another, widow not entitled to dower as against the equitable title," Id. In Thomas vs Thomas (10 Iredell p 123) it is laid down that, "Where a deed under which a widow's husband claimed had been delivered to him but had not been registered at the time of his death and could not since be found, it was held that he did not die seized and his widow could not recover dower at least in a court of law." The law contemplates a *certain definite absolute* seizure of the land not subject to any contingency. The land in controversy was in the possession of the Indians was wholly unoccupied by the whites when Uriah W. Skinner died, it had not been surveyed was not subject to entry till 1846, how then could there have been a seizure in the land in Skinner while he lived? There was no land *in esse* (so to speak) upon which seizure could operate, and the doctrine of relation never could be made to go back farther than the time the land was offered for sale in 1846. In that case the title by relation could not interfere with Goode's equity under the laws of Congress, as a settler as before remarked. The widow's right and the seizure of Uriah W. in the land in controversy depend exclusively for their support upon the fact that Calvin Skinner survived his father, Uriah, if he had not, the warrant never could have been located and ex neccessitate no seizure could arise and it would have been dormant and life could not have been infused into it by any act the widow could have done so in this view of the case the widow mnst rely upon the title of Uriah's Son, Calvin upon which to base and recover dower in this land and this the law will not permit.

The warrant had lain dormant from the death of Uriah, Jan. 1834 till 1844, two acts of Congress had expired by limitation of five years each; giving time in which to locate the warrants, before the right was renewed, in 1842; and at that time it was *renewed* in favor of the heir, the widow during all that time was endowable in the warrant if anything made no effort to procure it and none suspected

she was entitled to it and twice it ceased to be property susceptible of having dower assigned in it, and but for the act of 1842 it would be there yet. Under the act of 1842 the location could be made by "the heirs and legal representatives" and the location was required to be either in the name of the warrantee or his heirs or legal representatives, when the warrantee was dead the proper location would have been in name of Uriah W. Skinner or his heirs and legal representatives, and such entry vested the title in the warrantee if living and in his heirs if dead. Mr. Washburn on real property vol. 3. p, 117 sec. 7 referring to Slater vs Rassam says: "According to modern authorities there seems to be no difference between the words *Seisin* and *possession*," &c. The Supreme of Missouri in this case admit the force of the doctrine announced in Wells, guardian vs Moore, vol. 16 Mo. 478, and admit that, "When the pre-emptor dies the law makes the original grant to the heirs." "The pre-emptors right is merely to purchase at a fixed price within a limited time in preference to others." "The two cases are wholly unlike and present no similarity whatever." "In the case at bar the heir takes a discendible estate, as if there was a siezure in fact, on the part of the Ancestor," record p. 49. We think upon comparison of the two acts that this *court* will conclude there is a distinction without a difference.

The defendants in error claim that although the land was not surveyed or the warrant located during Uriah's life, yet it having been located upon this land in his name, such location casts a seisin by relation in Uriah from the issuing of the warrnt and the Supreme Court of Missouri in the opinion in this case appear to have been led into this theory, but as we think without mature reflection, In opinion (record p. 49,) they quote from Mr. Cruise as follows: "There is no rule better founded in law reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together and operate from the substantial part by relation." This is all correct but the design of the doctrine here announced by Mr. Cruise, is not to create a seizin by relation when there is no imperfect title to aid or existing equity to protect, but to give effect by relation to a deed executed out of time, and instances are cited by Washburn, Real Property, (Vol 3. p. 276, sec. 46) which comments upon Landes vs Brant (10 How 348) and others brought under review, where this doctrine applies; one is "Where the transaction is not complete in itself to convey title to lands, but by being connected with other acts or transactions as parts of the one under consideration, it becomes effective by the relation which the law creates between them, whereby they are made to partake of the character of a single and integ-

ral part. *One case is where a Sheriff sold land but no title was made* till a subsequent period during which the judgment debtor had died." "Where deed is given it relates back to the sale and is considered as then taking effect." Kent. C. J. in another case says: "A conveyance will in many cases be deemed to relate back to the time the agreement was made."

In case of Landes vs Brant (10 How 348, 373,) the title in question was an imperfect one in the original claimant under the Spanish Government and a creditor of the one holding this title seized and sold his title on execution, and subsequently the United States confirmed the title to the original claimant. It was held that by relation he was the real owner when the sale was made," (see Washburn 277 above quoted). Another class of cases is where deeds have been delivered as escrows, and before the event happens upon which they are to be delivered, the grantor dies, or, if a *feme sole* marries, the deed takes effect from its delivery as an escrow by relation." p. 277.

The cases cited by the Supreme Court of Missouri in its opinion to sustain seizin by relation and any kind of seizin to-wit: Magasine vs Tyler (40 Mo. 406) Landes vs Brant (10 How 348) Barr vs Gratz (4 Wheat 214) when examined are predicated upon cases entirely dissimilar to the one at bar. The title in Landes vs Brant, (supra) was founded upon a settlement on the land 10 years prior to the grant provided by the act of Dec. 20, 1803. Commissioners under act of March 3, 1807 confirmed the claim, the court decides that the title went back by relation to the time the *petition* for *confirmation* was filed. "The act granted the land settled upon." The case of Crowly vs Wallace (12 Mo. Rep, 145) was based upon "a claim presented by Cla Morgan by petition to have his *title confirmed*, which petition, with his title papers were recorded with recorder Dec. 10. 1805." see p. 272 of opinion, as his title was sold under execution and afterwards his title confirmed and the confirmation gave "complete legal title" and "to protect purchasers the rule applies that where divers acts concur to make a conveyance &c, the doctrine of relation applies and conclude that, the confirmation 1811 and patent of 1845 must be taken to relate to the filing of the claim in 1805."

The case of Barr vs Gratz (4 Wheat 213) supra is based upon the same theory and similar grounds. The court below in applying the doctrine of Cruise says: "We find that the *enlistment into the Military service by Uriah W, Skinner*, and the *promise* by the Government to give him 160 acres of land as a bounty were the substantial parts, they constitute the first in-ceptive acts and the patent must relate back to them according to the rule laid down in Maguire vs

Taylor and Landes vs Brant." (see record p. 50.) The error in the opinion of the court as we think is in carrying the relation back to the enlistment of the soldier and promise of the Government to give him bounty land; if the land located by the warrant were a part of that set apart for its satisfaction then the rule might apply, but the enlistment of the soldier and promise of the Government to give him land are not "*the substantial parts*;" there are many other acts that were more important and substantial to which relation could attach although the Soldier might enlist; unless he served and was honorably discharged he could get *no land*. Although honorably discharged if he never applied for a warrant and had it issued he could get none, although he procured the warrant, if it was not located within 5 years on one of the quarter sections drawn by lot by the Soldier, no land could be procured. These *acts* never having been done during Uriah's life-time, there was nothing upon which seizin by relation could operate except a mere in-operative inert permission of the Government given by the *warrant* and law for Uriah to get 160 acres of land if he would do acts prescribed by the law, accepting it, which he never did. The land in controversy not having been settled or in any way designated as belonging to or claimed by Uriah W. in virtue of the warrant or otherwise, there was nothing but the *warrant* upon which seizin by relation could operate and we contend that if relation applies at all it can only relate to the passage of the law of 1842 authoriising 160 acres of land to be entered with the warrant; 2nd directing how and in whom the title shall vest, and if this position be correct Calvin Skinner having located the warrant under authority granted to him under the act of 1842 although located in his father's name and the patent issued to Uriah, the title enured to Calvin by act of May 20, 1836, (see post,) and the location by Calvin related to the grant by the act of 1842, and instead of relation operating in favor of Uriah W. the dead man, it operated in favor of Calvin, and by operation of law vested the fee to the land in Calvin. On this point see also joint resolution No. 78, dated March 3, 1843. The Court below agreed that the right to the land in controversy was vested in Calvin by *descent* because the meritorious cause was the service of his father, Uriah, and that all the title Calvin acquired, was derived from the ancestor. We think the Court is incorrect in this position, from the considerations before submitted and hereinafter mentioned. It is true the original merit was by acts of Uriah, but the ground of the act of 1842 was the heir in being, without which no right could accrue after the soldier's death. The Court, to sustain its view, cite Hoekler vs Cabel, (1 Walker Mississippi Rep. p. 91), and Lessees vs Swearinger, (1 Ohio 182). As these authorities are mainly relied upon by defendants, in error,

the Court will please pardon us for reviewing them cursorily. The case of Hoekler vs Cabel, was an action for dower founded on the Mississippi Statutes, (See Hutchinson's Code, p. 621), as follows: "When any person shall die intestate, his widow shall be entitled to dower, to one-third part of all the land, tenements and hereditaments of which her husband died siezed and possessed, * * which said third shall be, and enure, to her proper use, benefit and behoof during life * * in which said third part shall be comprehended the dwelling honse in which her husband shall have been accustomed most generally to dwell next before his death, together with the offices, out houses, buildings and other improvements thereto belonging or appertaining.

Sec. 5. provides that "The widow may retain full possession of the dwelling house, with plantation, etc., thereto belonging, till dower is assigned.' The case is disssimilar to the one at bar in this; the record shows Martin Hoekler settled on the land in 1797, and *occupied* and *cultivated* it till his death, in 1804. After his death his widow as natural guardian; entered a claim to this land in name of heirs and legal representatives.

On June 11th, 1806, the Board of Commissioners gave a certificate to the heirs and legal representatives of Hoekler that they were entitled to a patent for said land, (640 acres), by virtue of act of 1803. On the 19th of July, 1819, a patent issued confirming the claim to said land in the legal representatives, (Hoeklers heirs), (being a donation). The act of March 3, 1803, granting this land, (See 2 Stat. U. S. p. 229, Sec. 2), provides, "To every person or to the legal representatives of every person who being either the head of a family or 21 years old, did on that day of the year 1797 * * * actually *inhabit* and *cultivate* a *tract* of land in said territory not claimed. * * * the said *tract thus inhabited* and *cultivated*, shall be granted," etc. This land was *designated, occupied* and as against the world was exclusively owned by Martin Hoekler, and the laws of Mississippi by express terms gave the widow dower in *this land*, and the heirs in this case properly took by descent; subject to her claims. The case of Lessee of bond vs Swearinger, (supra), is where a Territorial Statute of Ohio provides that when a bargain of land was made for a gambling consideration, the title should thereupon enure and vest in the heirs the same as though he died intestate. Judge Sherman says: "The law considers the bargainor *per hoc vice*, as dead, and the heirs take the title as though he had at that moment died." *This Statute in express terms vests the title to the land to all intents and purposes*, the same as though he *died intestate*. There is no possible analogy in principle between this case and the one at bar. The Court cites another case in Bond vs Swearinger. That

was a case based upon a *location entry*, by an ancestor, of Virginia land, the Court say "Nothing remained to perfect the title, but the patent, and as Massie the ancestor at his death had *an inchoate legal title to the lands designated* in his survey, which could be transferred, was subject to dower, etc."

This doctrine of seizin by relation, as contended for by defendant in error if applicable at all, cannot be allowed in this case, it would be the means of injuring intermediate innocent purchasers, or strangers who have acquired an interest in the land," and it would interfere with Goode's equity as a settler. Goode was an innocent purchaser. Plaintiff in error was a stranger to the transactions sought to be invoked here to his prejudice, and in such case the doctrine of relation will not be allowed. (See 3, Washburn Real Prop. 267). Frost vs Beckman, (1, John Ch. 287), Vancourt vs Moore, (26, Mo. 92). The Court below say that "No question of innocent purchaser can arise, for the record shows that Goode purchased the premises as the land of Calvin Skinner, and this deed was regularly recorded long before the land was conveyed to Parcels. Parcels then purchased with full knowledge, and if he was negligent in enquiring into Skinner's title, any loss he may suffer, he must attribute to his own want of watchfulness and care." To such positions and conclusions, we respectfully demur, for we maintain that the records accessible to him, do not exhibit the least intimation that the title is not what is purported to be conveyed "*the entire above premises.*" We maintain that the issuing of this patent in 1846, in the name of Uriah, was irregular and void in law, as to him. In Thomas vs Wyatt, (25 Mo. Rep 26), it is decided "There must be in existence some person or corporation or body, capable of taking at the time the patent issued. Nothing could pass to the patentee by virtue of a patent emanating after his death," and cite Collins vs Brannin and Framell, (1st Mo. Rep. (1815), page 384). Also, McCracken's heirs vs Beall, 4, A. K. Marsh, 1082, Judge Owsby, in delivering the opinion of the Court, says: Indeed, we cannot imagine how it is possible for any act necessary to the acquisition of a right to be done in the name of a dead person, and at the same time have any legal operation. After the decease, the dead person has no rights and no rights can be acquired by others in his name; entry in name of a dead man was adjudged void in case of McDonald's heirs vs Smalley, et. al., 6, Pet. 261, and Galt, et. al. vs Galloway, 4, Pet. 332, and in Galloway vs Tinley, 12, Pet. 297; this was settled law in Missouri from 1825 to 1857, and was the doctrine of the United States Supreme Court at the passage of the act of May 20, 1836. (Stat. Vol. 5, p. 31)- This act was designed to remedy this state of affairs and protect *bona fide* purchasers; their assignees, their heirs; it reads as follows: "That in all

cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein, shall *enure* to and become *vested* in the *heirs*, *devisees* or assignees of such deceased patentee, as if the patent had issued to the deceased person during life." This act by enurement, vests the title to the land in controversy in Calvin Skinner, discharged of dower of Priscilla, and in effect taken in connection with the act of the 27th of July, 1842, is a *new grant of bounty land* to Calvin Skinner. If this position be correct, no dower can arise in this case. The Court in this connection, are particularly cited to a joint resolution of Congress, No. 78, dated March 3, 1844, decisive of the proper construction of the acts of Congress touching the vesting of title; it reads as follows: "That *any* officer or soldier in the last war, who was entitled to bounty land, and has died before obtaining a patent * * * it shall be the duty of proper officers of the War Department, to issue the warrant or patent in the *name* of the *heirs* of such deceased soldier without specifying each, and the patent so issued in the name of the heirs shall enure to the benefit of the whole in such portions as they are severally entitled to by the laws of descent, in the State where the soldier belonged at the time of his death." See Land Laws and Regulations by Lester, Vol. 1, p. 91.

This was designed to vest the title to the land in the heirs of the soldier or their assignees, which by irregularity or failure in some particular, had not *vested* at all, and shows conclusively that Congress designed to cast the seizen in fee to the land in this case (which was similar), in Calvin Skinner, and if the widow in this case can get dower in this land it [redacted] defeats the design and intention of Congress as shown by the law and said resolution. In a further support of this positoon, see Wells vs Moore, 16, Mo. Rep. (Supra).

If land warrants are such real estate as contemplated by the dower law, and when located upon lands, the fee vests thereby in the original warrantee, we say that although land warrants, since 1847, are made assignable as well as certificate of location; yet the doctrine being that the seizin of the warrantee is in the land located nevertheless, necessarily dower rests therein, because "*the widow has not relinquished her dower thereto in the manner prescribed by law.*" This principle thus settled, would unsettle the title to millions of acres of lands honestly bought and paid for by purchasers of warrants, scrips and certificates of location, including "floats." The *seizin* depends upon the laws of the United States, dower upon State

laws. This is important to a large class of purchasers of Government land with warrants. Defendant in error insist, (but with little confidence), that plaintiff in error is estopped to deny the seizin of Uriah W. but the Court below do not attach any weight to that point. In Sparrow vs Kingman, I Comstock, 242, (which is a leading American case), settles the doctrine in New York, that a grantee of a husband is not estopped to show that he had not such seizin as will give dower and overrules Sherwood vs Vandenburg, (2 Hill, 303), Browne vs Potter, 17, Wendell, and all similar decisions. Julia A. Foster vs Rufus Dwinel, 1. American Law Register, p. 604, is another leading case to the same effect. The question in Missouri is settled the same way in Blair Guard. vs Smith, 16, Mo. Rep. 274 and 283 and authorities cited: although a party might be estopped to deny title in some cases. Yet, "estoppe cannot create a seizin to give dower." (See Sparrow vs Kingman, Supra). We therefore conclude then, that the judgment of the Court below, that the defendant in error is entitled to dower in the land in question is erroneous, and that the judgment of the Circuit Court was right.

Mark H Carpenter for
B. F. Barrow
P. Q.

IN THE SUPREME COURT

OF THE UNITED STATES,

WASHINGTON, D. C.

PRISCILLA JOHNSON, AND HENRY JOHNSON, HER HUSBAND, *vs.* E. W. PARCELS,

Respondent.

Appellant.

APPEAL FROM SUPREME COURT OF MISSOURI.

RESPONDENT'S
STATEMENT, JOINDER AND BRIEF.

IN THE SUPREME COURT

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STATEMENT OF CASE.

Pleas before Hon. E. V. Wilson, Judge of the Fourth Judicial Circuit of the State of Missouri.

STATEMENT.

Appellee for statement in this cause submits the following: That one Uriah W. Skinner was a soldier in the service of the United States under two acts of Congress; of the 24th of Dec. 1811 and of the 11th of January, 1812, in the 35th regiment of United States Infantry, and under said acts was entitled to 160 acres of land. That afterwards, on the 27th day of March, 1829, a warrant was issued to him, and then in the month of April, he was married to plaintiff, Priscilla, and they lived together until 1834, at which time he died, and she has

since married plaintiff, Henry Johnson. That afterwards, on the 11th day of January, 1847, said warrant was located on the tract of land in question, under act of Congress approved July 27, 1842, and patent issued to Uriah W. Skinner, March 5th, 1847, whereby the title vested, and said Uriah W. Skinner became seized.

This suit was brought in the Adair County Circuit Court of Missouri for the dower interest of plaintiff, Priscilla, who claims that she has the same right of dower as though the patent had been issued to Uriah W. Skinner while living. That she not only has dower in the land on which the warrant was laid, but also in the warrant before it was laid.

When Uriah W. Skinner died, he left Henry Calvin Skinner, his only heir, to whom the land descended.

That afterwards Wm. McNair, guardian of said H. C. Skinner, sold the land to one J. C. Good, who sold it to defendant. That defendant claims title through said Uriah W. Skinner.

That the case has not the matter been finally settled by the Supreme Court of Missouri. Dower being of a local nature and governed by the particular laws of each State, apellees hold that this court should dismiss the appeal since the Supreme tribunal of Missouri has said that according to Missouri law Demandant has dower. SECOND, admitting this court has jurisdiction. Demandant claims her husband was so seized as to give her dower under the statute of U. S. of 20th May, 1836, and by the doctrine of relation. THIRD, Henry Calvin Skin took the land by *descent*, and not by purchase. FOURTH, that Demandant has dower by Estoppel of appellant, he claiming through Uriah W. Skinner.

The case was tried in Circuit Court of Adair county, Missouri, by the Court, and judgment rendered for defendant, and plaintiff appealed to the Supreme Court of Missouri. In the trial of the cause the following declarations of law were asked by plaintiff, and refused by the court.

1. That if, on the 27th day of March, 1829, the "Military Bounty Land Warrant" issued by the Government of the United States to Uriah W. Skinner, numbered 26,198, under an act of Congress, passed the 6th day of May, 1812, was, on the 11th day of January, 1847, located in the name of Uriah W. Skinner, on the land in controversy, and afterwards, by virtue of said location and entry, the government of the United States issued a patent to the said Uriah W. Skinner, dated March 5th, 1847, and if on the——day of 1834, at the death of Uriah W. Skinner, the plaintiff, Priscilla Johnson, was the wife of said Uriah W., then the said Priscilla has dower in the said lands, although the said Uriah W. died before the location of said warrant, or the issuing of said patent.

2. The plaintiffs ask the court to declare the law to be—that although the warrant, No. 26,198 was located, and patent issued upon, and for the land in question, after the death of Uriah W. Skinner, in 1834, if he, the said Uriah W., was seized of said land at the date of his death, and at his the time; and if said Priscilla was the wife of said Uriah W. Skinner, at his death, in 1834, then the said Priscilla is entitled to dower in the said lands in controversy.

3. That the Statute of the United States, of 1836, passed May 20th,

1836, is construed to mean, that if a warrant, such as is in evidence, is located in the name of a person deceased, and a patent issues, then the location and patent are both valid, and the location, entry and patent relate back to the death of the patentee, and he was seized while living.

4. That the statute of the United States, of 1836, passed on the 9th day of May, 1836, is construed to mean, that if a Military Bounty Land Warrant, (such as is in evidence,) is located in the name of a person deceased, and a patent issues, then the location and patent are both valid and the location entry and patent relate back to the death of the patentee, and he was seized while living.

5. That in this case, the said Henry Calvin Skinner, or Calvin Skinner, heir at law, of Uriah W. Skinner, took the land in controversy by descent. That if the evidence shows that on the 11th day of January, 1847, Uriah W. Skinner entered the land in question, and that James Good accepted of a deed purporting to cover the land in question as that of H. C. Skinner, as heir at law of Uriah W. Skinner, and claims title through him, and that defendant accepted of a deed purporting to convey the land in question as the land of Good, and defendant now this time has shown no other legal title to said land, then in that case the defendant is estopped from denying the seizure of Uriah W. Skinner.

On appeal by demandant, Appelle here, the Supreme Court of Missouri rendered the following decision, found in 18th Mo. Rept. page 149, as follows :

"Wagner, Judge, delivered the opinion of the court.

"From the record in this case it appears that one Uriah W. Skinner was a soldier in the service of the United States, in the Thirty-fifth regiment of infantry, in the war of 1812, and as such was under the decrees Congress, entitled to 160 acres of land ; that afterward, on the 6th days of March, 1829, a land warrant was issued to him, and in April the same year he was married to the plaintiff, Priscilla, and they lived together until 1834, at which time he died, and she has since married Henry Johnson, who is made a plaintiff herein.

On the 11th of January, 1847, the warrant was located on a tract of land in Adair County, under an act of Congress approved July 27, 1842, and on March 5, 1847, a patent was issued in the name of said Uriah W. Of the marriage the only issue born was Henry Calvin Skinner, who survived his father, and McNair was appointed his curator, and under certain proceedings sold his interest in the above described land to one Good, who conveyed to Parcels, defendant. The plaintiff instituted this suit for the purpose of obtaining dower in the premises, and the court below decided that she was not entitled to recover. The only question, therefore, is whether Uriah W. in his lifetime had such a seizin or estate as authorized her to be endowed. It was said in the argument that she had received a third of the proceeds of the sale of the land, but the record fails to show any such fact, and she positively denies it.

The acts of Congress whence the title to the land emanated provided for giving, among other bounties, to soldiers who should enlist, 160 acres of land, to be designated, surveyed and laid off at the public expense,

in such manner and upon such terms and conditions as might be provided by law. (2 U. S. Stat. at Large, 669, 672.) Congress first prescribed that the land above designated should be located within certain defined limits and within a restricted period. But the limit was extended from time to time, and applied to other lands, till finally, by act approved July 27, 1842 (5 U. S. Stat. at Large, 497), it was enacted that in all cases for bounty lands for military services in the war of 1812, with Great Britain, which remained unsatisfied at the date of that act, it should be lawful for the person in whose name the warrant was issued, his heirs or legal representatives, to enter at the proper land office, in any of the States or territories in which the same might lie, the quantity of public lands subject to private entry to which the said person should be entitled in virtue of such warrant, in quarter-sections.

This act also allowed further time to complete the issuing and locating of military land warrants by continuing in force certain prior acts on the same subject, and provided that the certificate of location should not be assignable, but the patent should in all cases issue in the name of the person originally entitled to the bounty land, or to his heirs or legal representatives. Another act on the subject declares that 'in all cases where patents for public lands have been issued or may hereafter be issued, in pursuance of any law of the United States, to a person who has died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee, as if the patent had issued to the deceased person during life.' (5 U. S. Stat. at Large, 31,)

It is insisted for the defendant that Henry Calvin Skinner, the heir, took as a purchaser, and that therefore, no right of dower could attach in the plaintiff. But it is difficult to base this claim on any substantial ground. The patent issued by authority of the act of Congress, and the act of Congress was founded on a consideration directly moving from Uriah W. Skinner, the patentee and ancestor. It directly said to him, if you will enlist and perform certain military services, the government will give you as a bounty 160 acres of land. He accepted the proposition, executed his part of the contract, and the land warrant was accordingly issued to him. Henry Calvin gave no consideration, entered into no contract or purchase, and simply acquired title because he was heir. All the title that he possessed he derived from his ancestor.

This question has several times passed through judicial review in the tribunals of the country, and in all instances, so far as I have been able to learn, the courts have held that the heir takes this character of title by descent and not by purchase. (Hackler v. Cabel, Walker, Miss., 91; Bond's Lessee v. Swearingen, 1 Ohio, 182.)

The language of the act of Congress, it seems to me, is plain, and clearly expresses the intention had in view by the law-makers. It is that when, in pursuance of law, a patent has issued or may issue to a person who has died before the issuance of the patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee, as if the patent had issued to the deceased person during life. This clearly shows that a

descent of the premises was contemplated. Had the person lived and the patent been issued to him during his lifetime, the act would have been useless; for the land would have descended to the heir, devisee or assignee, in the very manner directed. But, being dead, the law relates the title back to the time when he was living, and, for all the purposes of descent and distribution, invests him with title.

Military bounty land warrants have always been considered as real estate, and go, upon the death of the holder, to the heirs at law, and not to the executors and administrators. Such has been the uniform view held and practiced by the general government. (3 Op. At.-Gen. 382.)

In the case of Wells v. Moore, 16 Mo. 478, it was held that under the act of Congress of March 3, 1843, a widow was not entitled to dower in land to which her husband had a mere right of pre-emption, which had not been consummated at the time of his death. The act of March 3, 1843, under which the decision was made, enacted that in any case where a party entitled to claim the benefits of any of the pre-emption laws, shall have died before consumating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of such party, or any of the heirs, to file the necessary papers to complete the same; provided that the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor; and a patent thereon shall cause the title to inure to the said heirs, as if their names had been specially mentioned.

When the pre-emptor dies, the law makes the original grant to the heirs. A pre-emption interest in lands is not an estate of inheritance. The pre-emptor's right is merely to purchase at a fixed price within a limited time, to the exclusion of others. He may be unable or unwilling to purchase at the price or by the time mentioned in the law, and the land may then be sold to others. These conditions annexed to his possession show clearly that he is not invested with an inheritable estate. Again, where the papers have not been filed by the pre-emptor in his lifetime, the executor or administrator, or the heir, is clothed with the duty of completing the same, and there is no recognition of the widow's right to dower. It is obvious that no part of her dower interest in the estate of her husband could be taken to pay the purchase of the pre-emption claim, and it would therefore have to be paid out of the balance of the estate.

The two cases are wholly unlike and present no similarity whatever. In the case at bar the heir takes a descendible estate, as if there was seizin in fact on the part of the ancestor; in the other case, when certain acts are performed by the executor or administrator or heir, there is an original grant to the heir.

There is another principle which is invoked in this case, and that is the doctrine of relation. Mr. Cruise, in his work on Real Property, says: "There is no rule better founded in law, reason and convenience, than this: that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."

In Magwire v. Taylor, 40 Mo. 406, we held that patents issued by the United States government relate back to the first or inceptive act in the

series of concurrent acts which are necessary under the law to complete the conveyance.

In Landes v. Brandt, 10 How. 348, the title in question was an imperfect one in the original claimant under the Spanish government, and the creditor of the one holding this title seized and sold it on execution, and subsequent to this the United States confirmed the title to the original claimant. It was held by relation that he was the real owner when the sale was made, and consequently the purchaser at the sheriff's sale held the land against the devisee of the original claimant. The same doctrine is announced in Barr v. Gratz, 4 Wheat. 218.

But courts will not apply the doctrine of relation when, by so doing, they will work injustice to the rights of innocent parties, acquired between the events which it is proposed thus to unite by relation, nor by making that tortious which was lawful originally.

A deed made in pursuance of a previous contract to sell, may, as between the parties to the same, relate back to the date of the contract; but it will not be allowed to do so to the injury of intermediate innocent purchasers, or strangers who have acquired an interest. (3 Washb. Real Prop. 477; Frost v. Beekman, 1 Johns. Ch. 297; Vancourt v. Moore, 26 Mo. 92.)

Now if we apply the doctrine laid down by Cruise, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation, we find that the enlistment into the military service by Uriah W. Skinner, and the promise by the government to give him 160 acres of land, were the substantial parts. In the language of this court, they constitute the first or inceptive acts, and the patent must relate back to them, according to the rule laid down in Magwire v. Tyler and Landes v. Brandt.

No question of innocent purchase can arise in this case, for the record shows that Good purchased the premises as the land of Henry Calvin Skinner, and this deed was regularly recorded long before the land was conveyed in Parcels. Parcels, then, purchased with full knowledge; and if he was negligent in inquiring into Skinner's title, any loss he may suffer he must attribute to his own want of watchfulness and care.

The result is that the plaintiff is entitled to dower in the land mentioned in the petition, and the judgement must therefore be reversed and the cause remanded. The other judges concur."

In the Supreme Court of Missouri, the following

ASSIGNMENT OF ERRORS

of the Circuit Court of Adair County, Missouri, was filed.

The Court erred

1. In overruling the motion of plaintiff to strike out part of defendant's answer.

2. In admitting in evidence conversations of McNair.

3. In admitting in evidence the testimony of Roland.

4. In admitting in evidence the testimony of A. Gilstrap.

5. In admitting in evidence the record of the Superior Court of Halifax county, North Carolina.

6. In admitting in evidence a Power of Attorney from Henry John-

son, and attached papers.

9. In admitting in evidence a Power of Attorney from plaintiffs to H. Harvey.

8. In refusing to give the declarations of law asked by the plaintiffs, and finding a verdict for defendant.

10. In overruling the motion of plaintiffs for a new trial.

11. In overruling the motion of plaintiffs in arrest of judgment.

12. In rendering judgment for defendant.

JOHN F. BENJAMIN, ELLISON & ELLISON, HARRINGTON & COVER, Attorneys for Appellees.

BRIEF.

General Statute of Missouri, 1865, page 518, sec. 1 is as follows:

"When any person having title to any real estate of inheritance, or personal estate undisposed of, or otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his *debts* and the *widow's dower*, in the following course," etc.:

Warrant is real estate and descends to heirs. Reader, et al vs. Barr et al, 5th Ohio, page 458; Brush vs. Ware, 15 Pet, 93; 3d vol. Opinions of Attorney Generals, page 382; Public Lands, laws and instructions, pages 63, 64 and 65, 176 and 184.

If the warrant is real estate, the defendant has dower in it. Then by what process has that dower been taken from her?

A Spanish grant is real estate, Papin vs. Massey, 27 Mo., 445. See argument of court 452.

The defendant herein, gets his title through the husband of demandant, as shown by the entire record. If not, whence does his title come from? Henry Calvin Skinner, gets the land by descent, and not by purchase. Chandler's heirs vs. Lewis Cable, Walker's Repts., page 97, (Miss.,) Lessee of Bond, vs. Swearingen, 1st Ohio, page 182; Douglas vs McCoy, 5th Ohio, page 526; (fully confirming last case.)

Again in the acts of Congress, approved Dec. 24, 1811, and section 1, of an act approved January 11, 1812; 2 Vol. U. S. Statutes, at large, pages 669 and 672, is the origin of the title to this land; said enactments being as follows:

CHAP. 10.—*An Act for completing the existing Military Establishment.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the military establishment, as now authorized by law, be immediately completed.

SEC. 2. *And be it further enacted*, That there be allowed and paid to each effective, able bodied man, recruited or re-enlisted for that service, for the term of five years, unless sooner discharged, the sum of sixteen dollars; but the payment of one half of the said bounty shall be deferred until he shall be mustered and have joined the corps in which he is to serve; and whenever any non-commissioned officer or soldier shall be discharged from the service, who shall have obtained from the commanding officer of his company, battalion or regiment, a certificate that he had faithfully performed his duty whilst in service, he shall moreover be

allowed and paid, in addition to the aforesaid bounty, three months' pay, and one hundred and sixty acres of land; and the heirs and representatives of those non commissioned officers or soldiers, who may be killed in action, or die in the service of the United States, shall likewise be paid and allowed the said additional bounty of three months pay, and one hundred and sixty acres of land, to be designated, surveyed and laid off at the public expense, in such manner and upon such terms and conditions, as may be provided by law.

APPROVED, December 24, 1811.

And section 12 of the act approved January 11, 1812, Entitled, "An Act to raise an additional Military Force," reads as follows:

SEC. 12. *And be it further enacted*, That there shall be allowed and paid to each effective able bodied man, recruited as aforesaid, to serve for the term of five years, a bounty of sixteen dollars; but the payment of eight dollars of the said bounty shall be deferred until he shall be mustered, and have joined some military corps of the United States for service. And whenever any non-commissioned officer, or soldier, shall be discharged from the service, who shall have obtained from the commanding officer of his company, battalion or regiment, a certificate, that he had faithfully performed his duty whilst in service, he shall moreover be allowed and paid, in addition to the said bounty, three months' pay, and one hundred and sixty acres of land, and the heirs and representatives of those non-commissioned officers or soldiers who may be killed in action, or die in the service of the United States, shall likewise be paid and allowed the said additional bounty of three months pay and one hundred and sixty acres of land, to be designated, surveyed and laid off at the public expense, in such manner and upon such terms and conditions as may be provided by law.

And the patent issuing after the death of Uriah W. Skinner is not void. 5 Vol. U. S. Statutes at large, page 31. But such patent is only evidence of already existing title. Hackler's heirs vs. Cabel, Walker's Rept. (Miss.) page 91.

And such patent relates back to the act of Congress granting the land, or at least to the termination of Uriah W. Skinner's services as a soldier in the war of 1812. Hackler's heirs vs. Cabel, Walker's Rept. page 91. 2d Vol. Washburn, real property, page 619.

The time for locating the Military Land Warrant, by various acts of Congress, was extended from time to time, until this warrant was located, under act of July, 1842.

U. S. Stat. at large, Vol. 3, Chapt. 41, page 487.

" " " " 4, 177, 60.

" " " " 6, 749

" " " " 5, 23, 380.

" " " " 5, 69, 497.

Uriah W. Skinner was seized of the land, in fact, by relation during life, by operation of act of Congress entitled: "An act to give effect to patents for public lands, issued in the name of deceased persons." Approved May 20th, 1828. U. S. Statutes at large, Vol. 5, Chapt. 76, page 31, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who hath died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall enure to, and become vested in, the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during life; and the provisions of this act shall be construed to extend to patents for lands within the Virginia Military District in the State of Ohio.

Approved May 20, 1836.

The decisions of the State of New York, giving construction to a similar statute, fully sustains this view.

Jackson vs. Winslow, 2d John. 80.
" " How 14th John. 405.
" " 2d Hill. 303.

The last case is a suit for dower.

Henry Calvin Skinner took the land by descent, and patent was not void. This question has been fully decided and construction given to U. S. Statutes of 1836. Schedde vs. Sawyer, 4th McLean, 181, 7th Circuit Ohio.

There is a resulting trust to plaintiff, Priscilla, which will give her dower under the decision made by the S. Ct. of Mo., in case of Wells' Guardians vs. Moore, 16 Mo., 478. See argument of Court. In that case the Statutes of pre emption made an original grant to the heirs. The Court held the widow not to be an heir. They say that if there was a resulting trust to her she would have dower, but there was no resulting trust because the money used to consummate the pre-emption, is money she had no interest in, and that the Administrator would not be authorized to use any of her money in making the pre-emption purchase. But in this case the defendant had an interest in the warrant that entered the land in dispute, such warrant being real estate. If so, how has her interest got out of it? Certainly there is a resulting trust to her in the land.

Doctrine of relation, in Crowley vs. Wallace, in 12th Mo. Rept. page 143.

Where the premises are sold by Sheriff, but no deed made till a subsequent period during which the judgment debtor dies, such deed relates back to the sale, and the debtor's death does not effect it. Jackson vs. McCain, 3d Cowen, 75 and 80; Vinors' ab. relation E.

Doctrine of relation—Landes vs. Brant, 10th How. 348, 373; Barr vs. Gratz, 4th Wheat. 213; Cavender vs. Smith, 5th Clarke, (Iowa) 157; S. C.; 5d Green, (Iowa) 349; Rogers vs Brent, 5th Gilm. 573. Frost vs. Beekman, 1st John. ch. 297; Butler & Baker's case, 3 Rep. 35.

If then the patent relates back to the act of Congress, or to the termination of Skinner's service as a soldier, or during his life, he is considered as being seized from that time, and consequently during the coverture. The provision, during the coverture, (Mo. Stat.) was never intended to restrict dower in the sense defendant contends, but to enlarge it, it need to be that dower was only assigned in lands the husband was seized of at

the time of marriage, and this term, "during the coverture," is introduced to enlarge dower, by giving the wife an estate in *all* the lands the husband was seized of either at time of marriage or during marriage. The only sense in which it can be looked upon as a restriction is, it prevents a claim for lands the husband has parted with before marriage. All lands which a married man, in any way, owned as his own, may be considered as descending to the heir, subject to debts and dower. The seizen of lands for dower is in no way more technical, than the seizen required in order that it may be inherited. And if it descends it is inherited.

Again, the defendant claims, through the husband of the demandant, and is consequently estopped. Defendant attempts to avoid the fact of his claiming through us, by his parol testimony, showing the warrant was sold. That this plan, as detailed in the evidence, was to convert the warrant into money. That Good never bought the land, but the warrant; this, however, is of no avail, for the warrant itself, reads in conformity with the law, authorizing its issuance that "And this warrant is not assignable or transferable in any manner whatever." 2d Vol. United States Statute at large, page 729, Sec. 2.

In the second volume of Scribner on dower the general doctrine of Estoppel is considered, from page 233 to 237.

All the objections to the doctrine of estoppel are examined, and the conclusion is that defendant is estopped. Park on dower holds same doctrine to be correct.

If Henry Calvin Skinner took the land by descent, as he assuredly did, and appellant claims title through him, as he does in this case, then the only title appellant has being that he obtained through Skinner, he can not be permitted to deny Demandant's dower in land he claims to hold in fee of Henry Calvin Skinner, to whom it descended from Demandant's husband, Uriah W.

In support of the estoppel, see Bancroft vs White, 1st Caines, 185; Hitchcock vs. Harrington, 6th John. 290; Hitchcock vs Carpenter, 9th John. 344; Collins vs Terry, 7th John. 278; Bowne vs. Potter, 17th Wend. 164; Embree vs. Ellis, 2d John. 118; Jackson vs. Waltermin 5th Cowen 301; Dolf vs. Bassett, 15th John. 21; Davis vs. Darron, 12th Wend. 65; Kimbal vs. Kimbal, 2d Green'l. 226; Nesen versus Allen, 6th Green'l. 243; Haines versus Gardner, 10th Manse. 383; Smith vs. Ingalls, 13th Maine 284; Campbell vs. Knight, 24th ib. 332; Cochrane vs. Libby 18th ib. 89; Carter vs. Parker, 28th ib. 259-309; Mann vs. Edson, 39th ib. 25; Hamblin vs. Bank of Cumberland, 19th ib. 66; Thorndike vs Spear 31st ib. 91; Wedge vs. Moore, 6th Cush. 8; Evans vs. Evans, 29th Pa. st. 277; Shaw vs. Galbraith 7th Barr, 111; Hyatt vs. Akerson, 2d Green. 564; Montgomery vs. Bruer, 2d South. 865; Thompson vs. Boyd 2d Zab. 543; English vs Wright, Coxe 437; May vs. Tillman, 1st Mann. 262; Coakely vs. Perry, 3d Ohio st. 344; Ward vs. McIntosh, 12th Ohio st. 231; Dashiel vs. Collier, 4th J. J. Marsh. 601; Wall vs. Hill, 7th Dana 172; Norwood vs. Marrow, 4th Dev. and B. law 442; Love vs. Gates, ib. 364; Gayle vs. Price, 5th Rich. L. 525; Hill vs. Robinson, 1st Strobh. 283; Randolph vs. Doss, 3d How. (Miss.) 205; Wooldridge vs. Wilkins, ib. 368; Chapman vs. Schroeder, 10th Geo. 321; Davis vs. O. Ferrell, 4th Greene 358; Griffith vs. Griffith

5th Harring, 5; Bardley vs. Clayton, 154; Pledge vs. Ellenbree, 6th Rich. L. 266. 12th Ohio st. 231 shows that the defendant is estopped from the "moral policy of the law."

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